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No. 86-1117 (3)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

RAYMOND BARTMAN, *et al.*,
Petitioners,

v.

ALLIS-CHALMERS CORPORATION and
INTERNATIONAL UNION UNITED
AUTOMOBILE AEROSPACE & AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA, *et al.*,
Respondents.

On Petition for A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF FOR ALLIS-CHALMERS CORPORATION IN OPPOSITION

Of Counsel:

DALE L. MATSCHULLAT
1205 South 70th Street
Milwaukee, WI 53214

VEDDER, PRICE, KAUFMAN
AND KAMMHOLZ
115 South LaSalle Street
Chicago, Illinois 60603

THEOPHIL C. KAMMHOLZ
(Counsel of Record)
RICHARD H. SCHNADIG
MICHAEL G. CLEVELAND
115 South LaSalle Street
Chicago, Illinois 60603
(312) 781-2300

STANLEY R. STRAUSS
1919 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 828-5035

Attorneys for
Allis-Chalmers Corporation

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether, in the circumstances of this case, the Court of Appeals properly held that Allis-Chalmers Corporation did not constructively discharge or otherwise discriminate against employees eligible for early retirement, and therefore did not violate the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621, *et seq.*

RULE 28.1 STATEMENT

Petitioner, Allis-Chalmers Corporation, is the only parent corporation. The following are the only subsidiary or affiliate companies of Allis-Chalmers Corporation:

AAF Heat Recovery, Limited

A-C Furesa Andina, S.A.

A-C Iberia, S.A.

Orissa Sponge Iron, Limited

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1-10) is reported at 799 F.2d 311. The decision and order of the United States District Court for the Eastern District of Wisconsin (Pet. App. 11-30) is unreported.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 32-33) was entered on August 20, 1986. On October 1, 1986, the Court of Appeals denied a petition for rehearing and suggestion for rehearing *en banc* (Pet. App. 34). The petition for a writ of certiorari was filed on December 30, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Age Discrimination in Employment Act of 1967, as amended, "ADEA," 29 U.S.C. 621, *et seq.* The relevant statutory provisions are set forth in the Appendix to this brief.

STATEMENT OF THE CASE

The Court of Appeals affirmed the District Court's grant of summary judgment to Respondent Allis-Chalmers Corporation ("Allis-Chalmers") and Respondent International Union United Automobile, Aerospace & Agricultural Implement Workers of America and its Local 248 ("the Union"). Petitioners are a group of some fifty-seven former Allis-Chalmers employees who retired from Allis-Chalmers' employ in November 1982. Petitioners' complaint in the District Court alleged that Allis-Chalmers' failure to assure them that their retirement benefits would remain unchanged during collective bargaining negotiations between Allis-Chalmers and the Union in November 1982 "resulted in their constructive discharge" in violation of the ADEA. The complaint also alleged that the Union violated the ADEA by failing to obtain through collective bargaining with Allis-Chalmers an opportunity for Petitioners to rescind their retirements.

A. The Facts

1. Allis-Chalmers, a manufacturer of industrial equipment, has had a series of collectively-bargained labor contracts covering the production and maintenance employees at its West-Allis, Wisconsin, plant. Employees covered by the labor contracts were also covered by a series of separate Pension Agreements, likewise collectively-bargained between Allis-Chalmers and the Union. The Pension Agreements, the expiration dates of which coincided with the labor contracts' expiration dates, functioned to establish the Allis-Chalmers Pension Plan. Among other benefits, the Plan afforded Allis-Chalmers' employees an early retirement option, under which employees with 30 or more years of service could retire before age 62 and receive an unreduced retirement benefit, including a supplemental allowance. Although, by its terms, the expiration of a governing Pension Agreement did not automatically result in the termination of the Pension Plan, the Plan document itself gave Allis-Chalmers the right unilaterally to modify, suspend, or discontinue the Plan upon the expiration of the applicable Pension Agreement (Pet. App. 2-3; Equitz Aff.—S/J Mot.).[1]

2. During 1981, the business of Allis-Chalmers was in substantial decline. A net loss was sustained in 1981 and substantial additional losses were anticipated for 1982 (Pet. App. 12). In these circumstances, Allis-Chalmers announced that it would seek concessions on wages and benefits from the Union, and requested the Union to open early negotiations for successor agreements to the 1980-1982 labor con-

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[1] Affidavit references in the text, set forth as "—— Aff.—S/J Mot.," are to affidavits filed in the District Court in support of Allis-Chalmers' motion for summary judgment.

tract and Pension Agreement. Contract negotiations began in October 1981 and continued intermittently until July 31, 1982, when they were suspended because the parties were unable to achieve agreement. They resumed in October 1982, but an agreement was not reached before the November 1, 1982, expiration date of the labor contract and Pension Agreement. By agreement, that expiration date was extended to November 15, on which date the contracts terminated. Allis-Chalmers and the Union encouraged employees, however, to continue working beyond November 15, with Allis-Chalmers announcing on November 12 that work would be available for all employees at the wage rates of the expired labor contract. The plant continued to operate on this basis until a new labor contract, agreed to on January 24 and ratified on February 6, 1983, came into being (Pet. App. 2-3, 14).

During the contract negotiations, Allis-Chalmers made no proposal to reduce pension benefits. Its only pension proposal was to change the manner in which the Pension Plan was funded. The Union, on the other hand, sought improvement in the pension benefits. In the agreement ultimately reached in 1983, pension benefits remained unchanged (Equitz Aff.—S/J Mot.).

3. As the November 15, 1982, expiration date of the 1980-1982 labor contract and Pension Agreement approached, employees with early retirement eligibility, including the Petitioners, became concerned about the status of their retirement benefits under the Company's Pension Plan. Their concern was not about the sufficiency of retirement benefits under whatever new agreements would be negotiated, but

was rather with what might happen to the benefits during the so-called "window" period between the expiration of the existing labor contract and Pension Agreement and the ratification of new ones (Pet. App. 3, 5, 15).

In early November 1982, some employees eligible for early retirement asked Daniel F. Kern, Manager of Employee Relations and Communications Services for the West Allis Plant, whether there would be any changes in the pension benefits if an agreement on a new labor contract was not reached by November 15, 1982. Kern replied that the Company was not planning to change the pension benefits if the labor contract and Pension Agreement expired on November 15; and he assured the employees that if the Company position changed, the Union would be given timely notice, so that eligible employees could retire before any pension change became effective (Pet. App. 4; Equitz Aff.—S/J Mot.).

On or about November 12, 1982, Allis-Chalmers managers responsible for the formulation of bargaining strategy discussed a Union bargaining request that Allis-Chalmers issue a written statement promising employees advance warning of any pension plan changes. The managers concluded that no such statement would or should be issued, basing their decision on the following considerations: (1) Allis-Chalmers' long-standing policy of not becoming involved in influencing employee retirement decisions, including a previous instance when the Company had attempted unsuccessfully to persuade employees not to retire; (2) a desire to avoid additional unfair labor practice charges; (3) the effect that issuing such a statement might have on the parties' contract negotiations; and

(4) the possibility that such a statement could be deemed to act as a waiver by Allis-Chalmers of important rights under the Pension Plan, such as the Company's right to amend or discontinue it (Pet. App. 3-4, 16-17; Equitz Aff.—S/J Mot.).

4. A substantial number of eligible employees, including the Petitioners, opted for early retirement before November 15, 1982, the expiration date of the 1980-1982 labor contract and Pension Agreement. Although Allis-Chalmers refused to issue the written "advance warning" statement requested by the Union, the Company waived the seniority termination provisions of the labor contract and permitted employees retiring during November 1982 to rescind their retirements and return to work by November 30 without loss of seniority. Allis-Chalmers informed all the retiring employees of this permissive policy at the time they signed their pension applications. A total of 320 employees retired between October 31 and November 15, 1982, not including 61 employees who took advantage of the opportunity to rescind their retirements and return to work without loss of seniority (Pet. App. 44, 17; Equitz and Price Affs.—S/J Mot.).

5. During the 1982 contract negotiations, the Union filed with the National Labor Relations Board a number of unfair labor practice charges concerning Allis-Chalmers' bargaining conduct. Acting thereon, the Board's General Counsel issued an unfair labor practice complaint against Allis-Chalmers. In January 1983, additional charges relating to Petitioners' retirements were filed with the Board and the General Counsel sought to amend the complaint to include the substance of these charges. As part of the con-

tract settlement, and upon the ratification of the new labor contract in February 1983, the unfair labor practice charges were withdrawn and the complaint was dismissed (Pet. App. 4, 8, 18).

B. The District Court's Decision

As stated, the District Court granted summary judgment in favor of Allis-Chalmers and the Union. Although "sympathetic to [Petitioners'] predicament," the District Court held, insofar as Allis-Chalmers was concerned, that the Petitioners had been unable to establish a *prima facie* case of age discrimination because they had been unable to show that they had been constructively discharged (Pet. App. 22). The District Court found (1) that Allis-Chalmers "did nothing to make the [Petitioners'] working conditions intolerable," (2) that Allis-Chalmers had no duty to issue the written assurance about pension benefit changes that the Petitioners and other employees had sought, and (3) that the Petitioners "retired based on their own speculation about what might happen in the future" (Pet. App. 26-27). The District Court noted that the Petitioners were "seek[ing] to escape retirement decisions that, while agonizing, were voluntary," and concluded that the Petitioners' retirement choices were not "involuntary" (Pet. App. 24, 28).

The District Court held further that the Union's conduct had not been shown to be discriminatory within the ADEA's meaning (Pet. App. 28-30).

C. The Decision of the Court of Appeals

The Court of Appeals affirmed the District Court's grant of summary judgment to Allis-Chalmers and the Union. 799 F.2d at 312, 316; Pet. App. 2, 10. At

the outset, the Court noted that, in reviewing a summary judgment, it was obligated to review the whole record and to reverse "if it is revealed that inferences concerning material facts contrary to those of the trial court may be drawn." 799 F.2d at 312; Pet. App. 2. *Sub silentio,* the Court of Appeals found that no such "contrary" inferences could be drawn.

The Court of Appeals agreed with the District Court that the Petitioners had failed to demonstrate that their retirements amounted to constructive discharges. Applying the principle that "[a]n employer constructively discharges an employee only 'if it *makes* an employee's working conditions so intolerable that the employee is forced into an involuntary resignation,' " the Court held that Allis-Chalmers took no action that "made" the Petitioners' situation apparently intolerable; rather, the Court said, the situation resulted from the expiration of the Pension Plan, itself an event brought about by the failure of the parties' contract negotiations, and the passage of time. 799 F.2d at 314; Pet. App. 6. Additionally, the Court held that Allis-Chalmers did not violate the ADEA under a disparate impact theory, rejecting the Petitioners' contention that during the "window" period Allis-Chalmers' extension of the opportunity for employees to work at old contract rates adversely affected employees eligible for early retirement. 799 F.2d at 315; Pet. App. 6-7.

The Court of Appeals held further that the reasons exonerating Allis-Chalmers from violating the ADEA also exonerated the Union to the extent that the Petitioners' claims against the Union rested on its acquiesence in Allis-Chalmers' conduct. Nor did the Union violate the ADEA, the Court held, by making prag-

matic collective bargaining decisions adverse to Petitioners' interest, thereby resolving, in the interest of the entire Union membership, the Union's conflicting obligations to current and retired employees. 799 F.2d at 315-316; Pet. App. 7-10.

ARGUMENT

1. The decision of the Court of Appeals with respect to Allis-Chalmers[2] was predicated on the unique facts of this case and is correct. The case's singularity derives from the specific collective bargaining agreements between Allis-Chalmers and the Union, Allis-Chalmers' option of effecting pension changes during the so-called "window" period of the parties' negotiations, and, in the Court of Appeals' words, from "the expiration of the Pension Plan [which was] an event brought about by the failure of the contract negotiations and the passage of time." 799 F.2d at 314; Pet. App. 6.

2. The Court of Appeals correctly concluded, in agreement with the District Court, that Petitioners were not constructively discharged by Allis-Chalmers. No evidence was adduced that even remotely showed that Allis-Chalmers intended to cause Petitioners' retirements. See *EEOC v. Federal Reserve Bank*, 698 F.2d 633 (4th Cir. 1983); *Thompson v. McDonnell Douglas Corp.*, 552 F.2d 220 (8th Cir. 1977); *Muller v. U.S. Steel Corp.*, 509 F.2d 923 (10th Cir. 1975), *cert. denied*, 423 U.S. 825 (1975). Further, no evidence showed that Allis-Chalmers created intolerable working conditions which could be said to have

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[2] We do not address herein arguments in the certiorari petition with respect to the Petitioners' claims against the Union.

caused Petitioners' retirements, much less that Allis-Chalmers created such conditions with a view toward Petitioners' ages and in order to cause their retirements.[3]

Nor was Allis-Chalmers under a legal obligation to issue the written statement Petitioners sought that would have assured them that there would be no reduction in retirement benefits. The ADEA imposes no obligation to reassure potential retirees that their benefits will remain the same. The ADEA is not an affirmative action statute. *See, e.g., Tice v. Lampert Yards, Inc.*, 761 F.2d 1210, 1217 (7th Cir. 1985); *Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1981). Contrariwise, Petitioners would impose upon Allis-Chalmers an obligation to take affirmative steps that would have enabled them to avoid the risks that are inherent for all employees in the collective bargaining process. Petitioners, however, are not entitled to be exempt from the latter risks simply because of their ages.

Further, as the Court of Appeals recognized (799 F.2d at 314, n.3; Pet. App. 9), in an analysis of the

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[3] There was no direct evidence of intentional age discrimination. Further, there was no indirect evidence of age-based motive. No economic reason existed for Allis-Chalmers to reduce the number of its older employees by coercing retirements. Indeed, Petitioners' retirements and their replacement by workers recalled from layoff was *more costly* to Allis-Chalmers than would have been the case had the Petitioners remained as employees. (Angermeier Aff.—S/J Mot.). Further, the most telling fact is that Allis-Chalmers offered all already-retired employees the opportunity to rescind their retirements and some 61 employees accepted and returned to work. 799 F.2d at 313; Pet. App. 4.

facts, Allis-Chalmers' bargaining situation is "important." For Allis-Chalmers to have issued the written reassurance statement that Petitioners sought, after having refused the Union's request that such a statement be issued, would have been contrary to Allis-Chalmers' duty under the National Labor Relations Act to recognize and bargain with the Union alone as exclusive collective bargaining representative of its employees. *See, e.g., NLRB v. M.A. Harrison Manufacturing Co.*, 682 F.2d 580 (6th Cir. 1982); *NLRB v. Jamaica Towing, Inc.*, 602 F.2d 1100 (2nd Cir. 1979); *C.K. Smith & Co.*, 227 NLRB 1061 (1977), *enf'd*, 569 F.2d 162 (1st Cir. 1977), *cert. denied*, 436 U.S. 957 (1978). Moreover, for Allis-Chalmers to have made a concrete commitment on a key fringe benefit issue would have interfered seriously with the normal collective bargaining process between Allis-Chalmers and the Union.

Finally, Petitioners were not confronted with actual, existing intolerable conditions of the sort necessary to support a constructive discharge conclusion. Petitioners were concerned only about what might happen, about what their future employment conditions and pension benefits would be, and not about what their existing employment conditions and pension benefits in fact were. See paragraph 5 of the boilerplate affidavit of Petitioner Monar at Pet. App. 38-40. In short, Petitioners were confronted with uncertainty—uncertainty that there might not be a new collective bargaining agreement, or that changes might be made in their retirement benefits. But such uncertainty is typical of what may confront any employee who is covered by a collective bargaining agreement with respect to any number of terms and conditions of employment. And it was precisely the

sort of uncertainty that, to a greater or lesser degree confronted *all* Allis-Chalmers employees when the 1980-1982 agreements expired, including those younger employees who also had an interest in their retirement benefits, although perhaps not as immediate as Petitioners'.

3. The Court also concluded properly that Allis-Chalmers did not violate the ADEA under a disparate impact theory. The essence of the disparate impact theory is that a facially neutral policy is nevertheless unlawful because it falls more severely on a protected group than on another group. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-431 (1971); *Dothard v. Rawlinson*, 433 U.S. 321, 328-29 (1977). Here, the correct answer to Petitioners' disparate impact contention that Allis-Chalmers deprived older workers of an employment opportunity offered younger workers by not announcing that pension benefits would remain unchanged (Pet. App. 25-29), is the one that the Court of Appeals stated: "This argument must fail because there is no act by Allis-Chalmers involved; rather [Petitioners] complain about the absence of an act. . . Allis-Chalmers was not obligated to rescue [Petitioners] from a predicament for which it was not responsible. To require it to do so would require Allis-Chalmers to treat older workers *better* than workers generally. The ADEA imposes no such obligation." [Emphasis in original]. 799 F.2d at 315; Pet. App. 7.

Because there was "no act" by Allis-Chalmers, it did the precise opposite of maintaining or applying a policy. Thus, in the context of disparate impact analysis, Allis-Chalmers' decision not to issue a "reassurance" statement was the equivalent of *not* having, for

example, a severance pay policy or *not* requiring employees to take tests. It cannot be seriously maintained that an employer which does *not* have a severance pay policy or which does *not* give tests to its employees nonetheless may be held liable under the disparate impact theory because some members of a protected group later assert that they would have been better off had the employer implemented such policies. Yet this, in essence, is Petitioners' position. If the position were to be accepted, any protected group could point to a situation where an employer had taken no action—had no policy—and could claim *post hoc* that the employer violated the law because if the employer had issued a policy (designed, of course, by the claimants) they would have been better off. Employers would thus be endlessly subject to second guessing and rationalization. No court has ever adopted such an approach; and this Court, like the Court of Appeals, should reject it here.[4]

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[4] Petitioners' reliance (Pet. App. 26-28) on *Transworld Airlines, Inc. v. Thurston*, 469 U.S. ——, 105 S. Ct. 613, 83 L.Ed. 2d 523 (1985) is misplaced. In that case, the airline *maintained a policy* of permitting captains disqualified from serving in that capacity for reasons other than age to transfer automatically to the position of flight engineer, while requiring age-disqualified captains to bid for flight engineer vacancies and to retire if no vacanies occurred prior to their 60th birthdays or if they lacked sufficient seniority to bid for those vacancies that did occur. The Court held that the airline's transfer policy denied 60-year-old captains a "privilege of employment" on the basis of age, saying: "The Act does not require TWA to grant transfer privileges to disqualified captains. Nevertheless if TWA does grant some disqualified captains the 'privilege' of 'bumping' less senior flight engineers, it may not deny this opportunity to others because of

4. Finally, contrary to Petitioners' contention (Pet. App. 32-34), the Court of Appeals' decision here is not in conflict with decisions of other Circuits. *Bibbs v. Block*, 778 F.2d 1318 (8th Cir. 1985), one such case cited by Petitioners to support this contention, involved an issue as to the quantum of proof necessary in a mixed-motive situation to establish intentional discrimination and liability under Title VII. This case, of course, is not a mixed-motive case, there being no showing that Allis-Chalmers took any action whatever, much less that it acted for both discriminatory and non-discriminatory reasons. Similarly inapposite are the other cases Petitioners cite in this context: *EEOC v. Bordens, Inc.*, 724 F.2d 1390 (9th Cir. 1984); *EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211 (3rd Cir. 1984); *Geller v. Markham*, 635 F.2d 1027 (2nd Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); and *Leftwich v. Harris-Stow State College*, 702 F.2d 686 (8th Cir. 1983). In the *Bordens* and *Westinghouse* cases, the employers actually *maintained policies* which denied severance pay to older workers; in the *Geller* case, the employer *maintained a policy* of only hiring teachers below a level of experience, thereby disadvantaging an older teacher; and in *Leftwich*, the employer *adopted* a faculty-selection *plan* that discriminated on the basis of age. Here, as the Court of Appeals stated, and as we have repeatedly pointed out, Allis-Chalmers took no action and maintained no policy or plan that can be said to have disadvantaged Petitioners.

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their age." 83 L.Ed. 2d at 533. Here, of course, as stated in the text, Allis-Chalmers maintained no policy which in any context could be said to have denied Petitioners a "privilege of employment."

CONCLUSION

For the foregoing reasons, further review by this Court is not warranted and the petition for a writ of certiorari should be denied.

Respectfuuly submitted,

Of Counsel:

DALE L. MATSCHULLAT
1205 South 70th Street
Milwaukee, WI 53214

VEDDER, PRICE, KAUFMAN
AND KAMMHOLZ
115 South LaSalle Street
Chicago, Illinois 60603

THEOPHIL C. KAMMHOLZ
(Counsel of Record)
RICHARD H. SCHNADIG
MICHAEL G. CLEVELAND
115 South LaSalle Street
Chicago, Illinois 60603
(312) 781-2300

STANLEY R. STRAUSS
1919 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 828-5035

Attorneys for
Allis-Chalmers Corporation

January, 1987

APPENDIX

RELEVANT STATUTORY PROVISIONS

Section 4, of the ADEA, as amended, 29 U.S.C. 623, provides in relevant part:

Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

* * * *

(c) Labor organization practices

It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way

which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

* * * *